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13      *C. R. Bard, Inc. and*  
13      *Bard Peripheral Vascular, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

18 IN RE: Bard IVC Filters Products Liability MDL NO. 15-02641-PHX-DGC  
Litigation

**19 || This Document Relates to:**

20 PAMELA NOTERMAN, an individual,

**Plaintiff,**

Case No. CV-15-01714-PHX-DGC

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23 C. R. BARD, INC., a New Jersey  
24 Corporation; AND BARD PERIPHERAL  
25 VASCULAR INC., (a subsidiary and/or  
Division of Defendant C. R. BARD, INC.)  
an Arizona Corporation.

**MEMORANDUM OF LAW IN  
SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS THE  
PLAINTIFF'S COMPLAINT**

## Defendants.

1           **I. INTRODUCTION**

2           The Court should dismiss the Complaint because it is a legal nullity. Plaintiff Pamela  
 3 Noterman filed a lawsuit on February 13, 2015 against Defendants C. R. Bard, Inc. and Bard  
 4 Peripheral Vascular, Inc. (collectively, “Bard”) for personal injuries allegedly sustained from  
 5 a Bard G2®X inferior vena cava filter (the “Filter”), and served the same on June 11, 2015.  
 6 The style of the Complaint lists “PAMELA NOTERMAN, an individual” as the plaintiff. At  
 7 the time the Complaint was filed, however, the plaintiff had been deceased for over nine  
 8 months. Because a deceased party cannot be party to a legal proceeding, the Complaint is  
 9 void *ab initio*. Accordingly, Bard respectfully requests that the Court dismiss the Complaint  
 10 with prejudice pursuant to Federal Rule of Civil Procedure 12(b).

11           **II. FACTUAL BACKGROUND**

12           Ms. Noterman’s lawsuit asserts negligence, strict liability, breach of warranty,  
 13 negligent misrepresentation, and punitive claims against Bard in connection with injuries she  
 14 alleges resulted from the Filter. (*See* Complaint generally). The Filter was implanted at  
 15 Naples Community Hospital in Naples, Florida on or about November 5, 2009. (*Id.* at ¶ 51).  
 16 Subsequently, in February 2011, the plaintiff presented to Lakewood Ranch Medical Center  
 17 in Bradenton, Florida with chest pains, and subsequent diagnostic testing revealed that the  
 18 Filter had fractured. (*Id.* at ¶ 53). Specifically, the Complaint alleges that, although the Filter  
 19 was successfully retrieved, a fractured strut remained in her body “causing [the plaintiff]  
 20 anxiety, stress, anxiousness, and constant worry [and] physical and emotional pain.” (*Id.* at ¶  
 21 54-6). The Complaint further avers that, as a result of the implantation of the Filter, she “is no  
 22 longer able to sustain the active lifestyle that she enjoyed prior to the time when she was  
 23 treated with the G2®X Filter” and that she “continues to suffer from physical and emotional  
 24 pain, including but not limited to chest pains.” (Compl. at ¶ 56).

25           The plaintiff’s Complaint was filed on February 13, 2015 and served on June 11, 2015  
 26 (*Id.*), but the plaintiff passed away on May 6, 2014.<sup>1</sup> As such, the plaintiff had been dead for  
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28           <sup>1</sup> See Copy of Death Certificate for Pamela Noterman, attached hereto as Exhibit A.

1 nine months before the Complaint was filed and over a year before the Complaint was served  
 2 on Bard.

### 3 III. ANALYSIS

4 The Court lacks jurisdiction to consider the Complaint because it is a legal nullity.  
 5 Accordingly, Bard respectfully requests that the Court dismiss this case pursuant to Federal  
 6 Rule of Civil Procedure 12(b).

7 “Only a real party in interest has the capacity to bring a lawsuit.” *In re Engle Cases*,  
 8 No. 3:09-CV-10000-J-32, 2013 WL 8115442, at \*2 (M.D. Fla. Jan. 22, 2013) *aff’d*, 767 F.3d  
 9 1082 (11th Cir. 2014); *Tennyson v. ASCAP*, 477 F. App’x 608, 610 (11th Cir. 2012) (citing  
 10 Fed. R. Civ. P. 17(a), (b)).<sup>2</sup> “The capacity doctrine relates to the issue of a party’s personal  
 11 right to litigate in federal court” and presents a jurisdictional issue to the court. *In re Engle*,  
 12 2013 WL 8115442, at \*2 (quoting *Glickstein v. Sun Bank/Miami, N.A.*, 922 F.2d 666, 670  
 13 (11th Cir. 1991), *abrogated on other grounds*, *Saxton v. ACF Indus., Inc.*, 254 F.3d 959, 963  
 14 (11th Cir. 2001)). “[A] party must have a legal existence as a prerequisite to having the  
 15 capacity to sue or be sued.” *Adelsberger v. United States*, 58 Fed. Cl. 616, 618 (Fed. Cl.  
 16 2003) (“The question presented is whether an action can be initiated in the name of a  
 17 deceased person. We think the answer is plainly, ‘no.’”). Indeed, under Florida law, a  
 18 deceased individual cannot be a party to a lawsuit. *Xtra Super Food Ctr. v. Carmona*, 516  
 19 So.2d 300, 301 (Fla. 1st DCA 1987). Here, however, the Complaint was filed on behalf of  
 20 Pamela Noterman in her individual capacity, despite the fact that she had been deceased for  
 21 several months. Hence, the Complaint is a nullity, which should be dismissed with  
 22 prejudice. See *In re Engle*, 2013 WL 8115442, at \*2.

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<sup>2</sup> This Court has vested authority to rule on this motion, which ruling shall be governed by Florida substantive law and federal procedural law. See *In re Donald J. Trump Sec. Litig.*, 7 F.3d 357 (3rd Cir. 1993) (*cert. denied*); *In re Prudential Ins. Co. of America Sales Practices Litig.*, 170 F.Supp.2d 1346 (Jud.Pan.Mult.Lit. 2001); *Sadler v. Pella Corp.*, 2015 WL 7454516 (D. South Carolina Nov. 23, 2015).

1       The court in *Engle* addressed the specific issue before the Court under federal  
 2 procedural law and Florida substantive law and dismissed the plaintiffs' complaints at issue  
 3 as legal nullities. As is the case here, well after suit was filed on behalf of a group of plaintiffs  
 4 in that case, discovery revealed that 521 plaintiffs had died before their cases were even filed.  
 5 *Id.* at \*1. Upon learning that the plaintiffs were deceased at the time their cases were filed, the  
 6 defendants moved to dismiss, with prejudice, contending that "the cases were, and are, 'legal  
 7 nullities' and the 'law permits no other result.'" *Id.* The plaintiffs conceded that they had filed  
 8 cases naming dead plaintiffs, but argued that their mistake was "a pleading deficiency related  
 9 to the capacity of the plaintiff, rather than a jurisdictional defect," and asked the court to  
 10 allow them to amend the complaint to allege wrongful death and survival claims. *Id.* The  
 11 district court refused to allow amendment, holding that filing a case on behalf of a deceased  
 12 individual was not a pleading deficiency, but that "personal injury actions filed in the name of  
 13 deceased smokers are nullities." *Id.* at \*2. The court therefore dismissed the case without  
 14 prejudice. *Id.*

15       As in *Engle*, federal and state courts interpreting other states' laws have consistently  
 16 held that cases filed naming deceased parties are nullities, which must be dismissed with  
 17 prejudice. *E.g., Banakus v. United Aircraft Corp.*, 290 F.Supp. 259, 260  
 18 (S.D.N.Y.1968) (Since [the plaintiff] was dead when the action for personal injuries was  
 19 commenced, that action must be treated as a nullity" and as such, "there were no claims  
 20 capable of amendment"); *Adelsberger*, 58 Fed.Cl. at 618–19 (action brought in the name of a  
 21 deceased individual declared null); *Banks v. Employers' Liab. Assur. Corp. Ltd., of London,*  
 22 *England*, 4 F.R.D. 179, 180 (W.D. Mo. 1944) (in dismissing suit brought in the name of a  
 23 deceased individual and stating "[c]learly a suit could not be brought in the name of [the  
 24 plaintiff] after his decease."); *Pasos v. Eastern S.S. Co.*, 9 F.R.D. 279 (D. Del. 1949) ("the  
 25 suit should be dismissed if the court is clearly convinced that neither at the institution of the  
 26 suit or at any time since has there been a legally existent party plaintiff and at no time could  
 27 there have been entered a valid judgment in the matter."); *Garlock Sealing Techs., LLC v.*  
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1      *Pittman*, No. 2008-IA-01572-SCT, 2010 WL 4009151, at \*4 (Miss. Oct. 14, 2010) (holding  
 2      that a case filed in the name of a deceased person was a legal nullity, adding that such an  
 3      action “has no hope of success and is therefore frivolous.”); *Black Canyon Citizens Coalition,*  
 4      *Inc. v. Bd. of County Comm’rs of Montrose County*, 80 P.3d 932, 933–35 (Colo.App.2003)  
 5      (suit filed in the name of a nonexistent corporation deemed void *ab initio*); *Mathews v.*  
 6      *Cleveland*, 159 Ga.App. 616, 617, 284 S.E.2d 634, 636 (1981) (deceased person cannot  
 7      commence an action); *Levering v. Riverside Methodist Hosp.*, 2 Ohio App.3d 157, 159, 441  
 8      N.E.2d 290, 291 (Ohio App.1981) (complaint declared a nullity where plaintiff died prior to  
 9      its filing); *Gregory v. DiCenzo*, 713 A.2d 772, 775 (R.I. 1998) (complaint commenced in  
 10     deceased person’s name deemed a nullity); *Williams v. Travelers Property & Casualty of*  
 11     *America*, 2007 WL 1299245 (Conn. Super. Ct. Apr. 13, 2007); *McCormick v. Illinois Central*  
 12     *Railroad Company*, 2009 WL 1392575 (Tenn. Ct. App. May 19, 2009).

13       The issue decided in *Engle* and the other cases cited above is identical to the issue in  
 14       the present case. In those cases, the courts consistently dismissed the complaints as nullities.  
 15       Similarly, because the Complaint was brought on behalf of Pamela Noterman in her  
 16       individual capacity, despite the fact that she had been deceased for nine months, the  
 17       Complaint should be void *ab initio*. Therefore, Bard respectfully requests that the Court  
 18       dismiss the Complaint with prejudice.

19       **IV. CONCLUSION**

20       Because the Complaint named Pamela Noterman as the plaintiff, despite the fact that  
 21       she was deceased at the time of filing, the Complaint is a nullity. For that reason, Bard  
 22       respectfully requests that the Court dismiss the Complaint with prejudice pursuant to Federal  
 23       Rule of Civil Procedure 12(b).

24       This 11th day of March, 2016.

25

26       s/Richard B. North, Jr.

27       Richard B. North, Jr.

28       Georgia Bar No. 545599

Matthew B. Lerner

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19 **Attorney for Defendants C. R. Bard, Inc. and**  
20 **Bard Peripheral Vascular, Inc.**

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1                   **CERTIFICATE OF SERVICE**

2                   I HEREBY CERTIFY that on March 11, 2016, I electronically filed the foregoing with  
3 the Clerk of the Court by using the CM/ECF system which will send notification of such  
4 filing to all counsel of record.

5                   s/Richard B. North, Jr.  
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